

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

AKIL AL-JUNDI, on behalf of himself and
all others similarly situated, et al.,

Plaintiffs, 75-CV-132

v.

**DECISION
and ORDER**

VINCENT MANCUSI et al.,

Defendants.

INTRODUCTION

The plaintiffs in this class action were inmates in D-Yard at the Attica Correctional Facility ("Attica") on September 13, 1971. They brought this action seeking damages for civil rights violations, claiming that they were injured by law enforcement officers during and after the retaking of Attica on September 13, 1971, which ended a four-day riot. The case was commenced on September 12, 1974 and has a long, complex procedural history, including several trials and appeals. On August 12, 1999, the case was re-assigned to this Court for expedited treatment pursuant to the decision of the Second Circuit Court of Appeals dated August 3, 1999. Following intensive negotiations, the parties presented a proposed Settlement Agreement dated January 4, 2000 which provided for the State of New York (without admitting liability) to pay \$8,000,000.00 into a fund to be apportioned by the Court among the qualified plaintiff class members. The terms of the

settlement require the Court to determine the individual awards in proportion to the seriousness of the injuries sustained by all class members making claims. The Settlement Agreement also provides that a separate fund be established in the amount of \$4,000,000.00 by the State for disbursement to plaintiffs' class attorneys for legal services rendered during the past 25 years in addition to those rendered in these proceedings. Allocation of those funds will be dealt with in a separate decision.

The intent of the settlement is to limit recovery to only class members who were defined in a 1979 Decision as those Attica inmates who were in D-Yard on September 13, 1971. The settlement is specific in this regard and, therefore, cannot cover injuries sustained by inmates who are not class members even though they may have been injured elsewhere at Attica on or after September 13, 1971. Nor, unfortunately, can the settlement benefit the families of the deceased or injured hostages. A significant benefit of the settlement process was to afford the class members the opportunity to testify publicly and to bring this case to a conclusion without establishing fault or responsibility. Finality and resolution are thus achieved to the extent possible under the circumstances presented to this Court.

A fairness hearing was held on February 14, 2000 which gave class members the opportunity to express their views with respect to the proposed settlement. This Court then issued a Decision and Order dated February 15, 2000 granting preliminary approval of the proposed settlement and directing that notice of the settlement terms be provided to class members by regular mail and by publication. Class members were required to file sworn claim forms by no later than July 7, 2000 in order to participate in the settlement. Class members were also informed that each would be given the opportunity to supplement his claim with in-court testimony if he so desired. Class members choosing not to testify would have their claims fully considered on the basis of the sworn claim form along with any documentary proof in support of the claim.

PROCEDURE FOR EVALUATING CLAIMS

The settlement requires the Court to make a proportionate, equitable distribution of the settlement fund among the qualified class members. A procedure was established for each class member to make a claim and for the Court to evaluate the claim and determine its value based upon the comparative seriousness of the injuries sustained. All claims, including the death claims, shall be paid from the settlement fund which

was initially established in the amount of \$8,000,000 paid into the Registry of the Court subject to the Court's control.

Verification of Class Membership

The Settlement Agreement provides that only class members are entitled to share in the proceeds of the settlement fund. The plaintiffs' class is defined in a Decision and Order dated October 31, 1979, as "all persons who were on September 13, 1971 inmates of the Attica Correctional Facility, Wyoming County, N.Y., and who were present in D-yard of Attica on such date." Following the announcement of the settlement on February 14, 2000, this Court received 581 claims from individuals claiming to be class members. It was critical to first verify the claimant's membership in the plaintiffs' class. The Court reviewed Attica prison records listing the name of every inmate incarcerated at Attica on September 13, 1971 and separately identifying those inmates who were present in D-Yard on that date. The Court also examined the inmate's individual prison files produced by the New York State Department of Corrections during the discovery phase of this litigation to search for any documentary evidence which could confirm whether or not he was at Attica and present in D-Yard on September 13, 1971. If no documents were found, then a separate notice was sent by the Court to that claimant or his representative providing him with an opportunity within one month to supplement his claim with any

evidence to refute the presumption that the claimant was not present in D-Yard on September 13, 1971.

Those persons whose claims were disallowed or withdrawn are listed in Appendix III and are not entitled to share in the settlement proceeds.

The Claim Process

A claim form was made available to each claimant together with instructions for completing and filing the claim with the Court by no later than July 7, 2000. A small number of claims were accepted after the July 7, 2000 deadline from claimants who provided a reasonable explanation for not filing sooner. Each claimant was to verify that he was an inmate in the Attica Correctional Facility in D-Yard on September 13, 1971 and was injured as a result of the retaking. Each was required to describe the nature and extent of the injuries sustained together with any supporting medical information which might be helpful to the Court. Once the claim was filed, each was afforded the opportunity to testify in support of his claim in open court. However, many chose not to testify but instead relied upon their verified claims together with any additional supporting material. Appearance in Court was not mandatory to prove the value of a claim. Those who chose to testify gained no financial advantage over those who chose not to testify.

Approximately 200 plaintiffs chose to testify in support of their claims during the period May through August, 2000. Approximately 160 appeared in person and gave their testimony at the Federal Courthouse in Rochester, New York. Many traveled at their own expense from various locations in New York, and from New Jersey, South Carolina, Ohio, Pennsylvania, Florida, and Minnesota. With the cooperation of the New York State Department of Corrections, those plaintiffs who are currently incarcerated in various New York prisons were able to give their testimony by telephone or video conference from the prison where they are located. The remaining incarcerated plaintiffs were transported by the New York State Department of Corrections and, with the cooperation of the U.S. Marshal and the Immigration and Naturalization Service, Court was convened at the Federal Detention Facility in Batavia, New York on August 2, 2000 and their testimony was taken.

The Evaluation Process

A distribution formula was adopted which equitably distributes the settlement proceeds among the qualified claimants. Each claim was evaluated and placed in one of five categories based upon the relative seriousness of the injuries sustained. Those categories represent groups of injured inmates ranging from those who were least injured in Category I to the death claims in Category V. The following categories were

established based upon a discernible cluster of inmates having suffered a similar degree of injuries in each category. This determination was made after hearing all claims and evaluating all injuries sustained by each claimant. Some overlap was inevitable because the process was not scientific and a mathematical certainty could not be achieved. **Category I**

Inmates in this category were beaten, ran the gauntlet, received physical injuries, suffered emotional distress, nightmares, etc., or experienced any combination of these occurrences.

Category II Inmates in this category received beatings which resulted in broken bones, including broken fingers, broken ribs, loss of teeth, and continue to suffer from emotional distress.

Category III Inmates in this category received gunshot wounds and/or were singled out for special treatment such as being subjected to more severe, repeated beatings which resulted in a permanent disability and continuing emotional distress.

Category IV Inmates in this category received very severe, multiple beatings, were subjected to acts of torture, or were severely wounded by gunfire. The injuries were life-threatening and resulted in serious permanent disability, either physical or emotional.

Category V Inmates in this category died as a result of gunshot wounds received during the retaking.

I found the claimants, for the most part, to be credible and some understated the extent of their injuries and how those injuries affected their lives. Many gave testimony under obvious emotional strain - finding it difficult to recount the events after suppressing memories for 29 years. And, many remain casualties because of lingering physical problems and the inability to erase memories of Attica.

Generally their testimony, as to the extent of their injuries and the treatment they received on September 13, 1971, was consistent with information contained in "The Official Report of the New York State Special Commission on Attica," (The McKay Commission) and with testimony in a number of Court of Claims trials arising out of the Attica uprising.

A number of the plaintiffs testified that their sole source of income is provided by public assistance. Indeed, many are destitute. The awards the Court makes today are not intended to be a substitute for public assistance for day-to-day costs of living but rather to supplement such assistance to enhance the lives of the plaintiffs. Indeed, the majority of the awards contemplated are of a modest sum and not large enough to be a substitute for other assistance received by the former inmate plaintiffs.

DISPOSITION OF CLAIMS

TOTAL CLAIMS FILED: 581

DUPLICATE CLAIMS FILED - 38
DISALLOWED OR WITHDRAWN CLAIMS - 41
TOTAL VALID CLAIMS 502

<u>BREAKDOWN BY CATEGORY</u>	<u>AMOUNT PER CLAIM</u>
CATEGORY I: 260	\$ 6,500.00
CATEGORY II: 112	\$ 10,000.00
CATEGORY III: 95	\$ 31,000.00
CATEGORY IV: 15	\$125,000.00
<u>CATEGORY V: 20</u>	<u>\$ 25,000.00</u>
 SUBTOTAL	 502

TOTAL ALLOWABLE CLAIMS 502

Having examined all claims, I determine that the amount awarded to each of the claimants is fair and equitable given the circumstances presented and the limited funds available for distribution.

DEATH CLAIMS

Although 29 inmates died as a result of gunshot wounds inflicted by the authorities during and after the retaking, only 20 claims were made on their behalf by their legal representatives. Their claims are placed in a separate category and are listed in Appendix II.

In determining the value to be apportioned to each death claim, the Court is limited to considering only the deceased inmate's conscious pain and suffering as the measure of damage. As provided in the New York Estates Powers and Trusts Law, § 11-3.3,

[w]here an injury causes the death of a person the damages recoverable for such injury are limited to those accruing before death and shall not include damages for or by reason of death, except that the reasonable funeral expenses of the decedent, paid by the estate or for the payment of which the estate is responsible, shall be recoverable in such action. The damages recovered become part of the estate of the deceased. (Emphasis added.)

The plaintiffs initially sought recovery for injuries resulting from a variety of civil rights violations under 42 U.S.C. § 1983. No claim was made either in the complaint or amended complaint for wrongful death of those killed. Therefore, in determining the amount to be awarded to the estates of those inmates who died from injuries received during the retaking, the Court is limited to considerations of the extent of claimant's conscious pain and suffering prior to dying. Factors such as the inmate's future earning capacity, life expectancy, age, and health, which would normally be considered in a wrongful death action under New York law in determining damages, are not relevant in this instance. Put simply, these are not wrongful death cases because they were not alleged as such in the complaint. These are cases where the severity of the plaintiffs' injuries caused death and the measure of damage is the extent of the conscious pain and suffering endured. With only sparse records available 29 years

after the event, the task of determining the extent of conscious pain and suffering was difficult.

The testimony of surviving inmates who witnessed the shooting of some of the inmates indicated that they either died quickly or lingered at most for hours.¹ Most died in the prison infirmary or while lying in D-Yard. All died on September 13, 1971 with the exception of William McKinney who died on September 15, 1971 at Meyer Memorial Hospital in Buffalo, New York.

Because the settlement fund consists of a fixed sum which is to be distributed among both injured inmates who lived and those who died from injuries received on September 13, 1971, considerations of proportionality are imperative. There are only so many dollars to be apportioned among those who were injured and those who died as a result of the injuries received during the retaking. Under ideal circumstances with unlimited resources for compensation, many of the inmates (those killed and those who survived with extensive injuries) might be entitled to larger awards.

After weighing all these factors, I determine that each death claim shall be awarded \$25,000 which is to be paid to the legal representative of the deceased inmate's estate. I also determine that a \$2,000 enhancement for the two additional days

of conscious pain and suffering sustained by William McKinney is appropriate for a total award to his estate of \$27,000.

Although the amount awarded to inmates who were killed is less than the amount awarded to those inmates who were severely injured and tortured or who survived their gunshot wounds, it reflects the limited period of time the deceased inmates experienced conscious pain and suffering in comparison to those inmates who have suffered with their injuries for the past 29 years - injuries, in many cases, which have been severely disabling or extremely painful. This determination in no way discounts or minimizes the severity of the pain suffered by those inmates who died as a result of their injuries, but instead attempts to fairly apportion a limited settlement fund among class members who received a wide variety of injuries.

I feel the apportionment of the settlement fund among the living and the dead is fair. Not perfect - but fair.

A list of each death claim and the amount awarded to the respective legal representative, together with a synopsis of each claim, appears in Appendix II.

TESTIMONY

On May 24, 2000, this Court began hearing testimony of the individual plaintiffs which, for many, was a highly emotional experience. They expressed gratitude for the opportunity to finally tell their stories. For many, the privilege of

recounting their odyssey was of greater value than achieving compensation. And for some, time had run out and their stories were told by surviving family members.

The recurring theme was that they found themselves in D-Yard on September 9, 1971 (the start of the riot) simply by being in the wrong place at the wrong time. Each had his own story of how he got there.

At first, realizing that they were not under the immediate control of the guards, a carnival-like atmosphere prevailed. But, they knew that this new found freedom would not last. Each of the inmates was helpless to end the impasse and some described it as being in "no man's land." They waited for something to happen - they all knew it would not end peacefully.

It rained heavily the night before the retaking. They knew that Corrections Officer Quinn had died and that negotiations had ended. They prepared themselves for the worst and, on September 13th, they were not disappointed.

They testified about hearing the whirring noise of the helicopter that hovered over D-Yard in the misty, gray early morning hours of September 13, 1971 and seeing the clouds of gas it delivered to immobilize the inmates. They heard announcements over a bullhorn to "raise your hands above your head and go to the nearest officer and you will not be hurt."

Unfortunately, that was not the case. Gunfire started simultaneously which "sounded like it came from automatic weapons."² At first, they thought the gunfire was with rubber bullets - merely to stun them or frighten them. But, as they saw inmates around them being shot, they knew that it was "for real." Bullets were everywhere, chipping concrete from the barrage of gunfire. They testified of the helplessness and the fear they felt as they sought refuge behind any object in the unprotected courtyard.

When the shooting stopped, they were corralled and directed by the guards and troopers to move into A-Yard. As they entered A-Yard, they were ordered to remove their clothing and lie face down in the mud. If they moved, they were beaten and, in some instances, shot by the troopers. They were humiliated as they lay nude, next to each other, face down in the mud - beaten if they raised their heads. They were then ordered to get up and move single file with their hands over their heads and ordered to run "the gauntlet" through the A-Yard tunnel. As the inmates ran or crawled or stumbled in the tunnel leading to A-Block with their hands behind their heads and stripped of their clothing, the corrections officers hit them with their clubs - calling them "nigger" or "nigger lover S.O.B." and other racial epithets. Each described the viciousness of the beatings with vivid detail.

Many of the plaintiffs could not recall how many times they were beaten while going from D-Yard to A-Yard and eventually placed in a single cell with three or more inmates - all nude - all in need of medical attention. While in their cells, they were beaten, tortured with Russian roulette, and each was eventually given one baloney sandwich 24 hours later on September 14, 1971.

One factor was common among all plaintiffs: the treatment they received stripped them of their dignity and they felt dehumanized, "like garbage." The force used upon them after the retaking ranged from brutal beatings and acts of torture to killings. As one former inmate testified, "[i]t was all so unnecessary - all they had to do was to wait it out - we had nowhere to go."

The events of the morning of September 13, 1971 left indelible impressions upon each of the plaintiffs after having been subjected to indignities and unwarranted, brutal treatment. Although they have left Attica, Attica has not left them. After having been assured that nothing would happen to them if they followed orders and proceeded to the nearest corrections officer, they were nonetheless shot at and beaten in the same instance. Many cannot shed their bitterness of that betrayal. In a report submitted by Dr. David J. Barry, a psychiatrist, he concluded that "[t]he tragic, and yet devastating, attack on the

inmates by the officers was a psychological as well as physical stressor of such magnitude that only a few could be expected to escape lasting adverse effects."

The events testified to by the former inmates were corroborated in a comprehensive report prepared on October 7, 1975 by Justice Bernard S. Meyer, acting as Special Assistant Attorney General, submitted to then-Governor Hugh L. Carey. Justice Meyer wrote:

Clearly the State has dealt unfairly with the inmates and affirmative action is necessary to correct the situation. Whether any individual enforcement official was justified in firing the shots he did, whether some of the shots fired resulted from malice, from emotion and hostility, improper planning by the assault commanders or their failure properly to instruct their men, the fact that 39 men died and 89 men were wounded by enforcement official gunfire though the inmates had no firearms makes indelibly clear that more force was used than was necessary to accomplish the retaking.

Whether malicious or the unfortunate result of false rumors of throat slitting and castration, it is evident from testimony under oath that criminal acts of brutality to inmates occurred during the rehousing.

And concerning the status of criminal investigations, Justice Meyer reported that:

. . . [at present writing], four years after the riot, 62 inmates have been charged in 42 indictments with 1,289 separate counts while but for one indictment, for reckless endangerment, has been handed up with

respect to a crime by a State Trooper.
(Emphasis mine.)

Following the report, Governor Hugh L. Carey, on December 21, 1976, announced that he would pardon seven inmates and commute the sentence of an eighth to "close the book" on the 1971 Attica prison riot because it was,

irrefutably clear that the State, through its highest officials, failed abysmally in upholding [principles of evenhanded justice] in the handling of the Attica investigation and prosecution . . . [therefore] equal justice by way of further prosecutions is no longer possible.

In so doing, the State of New York was precluded from pursuing any criminal charges against any of the officers who took part in the retaking on September 13, 1971. "Attica lurks as a dark shadow over our system of justice," Governor Carey concluded.

Just because it is history does not mean it is all in the past. Indeed, Attica is the ghost that has never stopped haunting its survivors - including both the inmates and the families of the deceased guards and prison personnel. But at least the settlement of this case provides the basis for the former inmates to close the book on the past and to focus on the future. It was best said by Gene Hitchens as he concluded his testimony:

I'm leaving Attica here today, your Honor.
This is where Attica ends for me . . . I
don't want to talk about it [anymore]. I
don't want to live it again.

A list of the claimants and the amount to be paid to each from the settlement fund is in Appendix I together with a synopsis of each claim.

CONCLUSION

For the reasons set forth in my February 15, 2000 Order, and this Decision and Order, I find that the settlement is fair and equitable considering all of the circumstances surrounding the history of this case. I further find that the evaluation and distribution plan is fair and equitable and the Clerk of the Court is directed to make payments to the class members as provided in this Decision and Order.

The Settlement Agreement presented to this Court on January 4, 2000 is approved and the case is hereby dismissed with prejudice pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. All class members are therefore enjoined from instituting or prosecuting any further action or proceeding regarding the settled claims.

The Clerk of the Court is directed to distribute the settlement proceeds from the Attica Settlement Fund on deposit in the Court Registry in the amount specified herein to each claimant or his legal representative. The Clerk is also directed to distribute a proportionate share of the remaining accrued interest earned by the settlement fund to the plaintiffs

less \$75,000 to be retained by the Clerk of the Court as a contingency fund to be disbursed as may be provided by the further order of this Court. In all cases where a claim has been filed on behalf of a deceased class member, payment shall be made only to the legal representative of the deceased plaintiff's estate. Legal representatives must provide proof of their appointment by a Court of competent jurisdiction.

The Clerk shall not make any distribution of funds until the time for the appeal of this Decision and Order has expired. If an appeal is taken, no distribution of funds shall be made until the appellate process is concluded.

Finally, this Court retains jurisdiction over enforcement of the Settlement Agreement and all the terms thereof, including the distribution of the settlement proceeds and the accrued interest.

The Clerk of the Court is hereby directed to enter final judgment in accordance with this Decision and Order.

ALL OF THE ABOVE IS SO ORDERED.

MICHAEL A. TELESKA
United States District Judge

Dated: Rochester, New York
August 28, 2000

1.The testimony of John Kabel, an Emergency Medical Technician present in D-Yard on September 13, 1971, corroborates this view. His sworn affidavit appears in Appendix IV - "Corroborating Testimony."

2. In a trial held in the New York Court of Claims brought by the widow of a deceased hostage, witnesses estimated the firing lasted from 4 to 12 minutes during which time 261 rounds of 12 gauge "00" buckshot were fired discharging approximately 3,000 lethal pellets. In addition, an estimated 103 rounds were fired from .357 caliber, .38 caliber, and .270 caliber weapons. Jones v. State of New York, 96 A.D.2d 105, 107 (4th Dept. 1983), appeal denied, 62 N.Y.2d 605 (1984). Also, the testimony of Michael Smith, a former corrections officer held hostage who was shot four times during the retaking, describes the intensity of the gunfire. A summary of his testimony appears in Appendix IV - "Corroborating Testimony."